

1 UNITED STATES
2 ENVIRONMENTAL PROTECTION AGENCY
3 REGION 8

4 Docket No. CWA-08-2003-0078
5
6

7 In the Matter of:

8)
9 Miller Weingarten Realty, LLC)
10 a Colorado corporation,)

11)
12 Adolfson & Peterson, Inc.)
13 a Minnesota corporation,)

14)
15 Respondents.)

**PENALTY COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

16
17 **INTRODUCTION**
18

19 1. This civil administrative enforcement action is authorized by Congress in section
20 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act
21 (CWA or the Act). 33 U.S.C. § 1319(g). The Environmental Protection Agency (EPA)
22 regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal
23 Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute
24 violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of
25 Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or
26 Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of
27 Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.
28

29 2. The undersigned EPA official has been properly delegated the authority to issue this
30 action. EPA has consulted with the State as required by the Act. 33 U.S.C. § 1319(g)(1).
31

32 3. EPA alleges that Respondents have violated the Act, permit and/or regulations and
33 proposes the assessment of a civil penalty, as more fully explained below.
34

35 **NOTICE OF OPPORTUNITY FOR A HEARING**
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37 4. Respondents have the right to a public hearing before an administrative law judge to
38 disagree with (1) any fact stated (alleged) by EPA in the complaint, (2) the grounds for any legal
39 defense, or (3) the appropriateness of the proposed penalty.
40

41 5. To disagree with the complaint and assert your right to a hearing, Respondents must
42 file a written answer (and one copy) with the Regional Hearing Clerk (999 18th Street; Suite 300

(8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENTS' RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE ACT.**

QUICK RESOLUTION

6. Respondents may resolve this proceeding at any time by paying the penalty amount proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondents' right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ; extension 6917 or 303-312-6917] or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to all times relevant to this action, and to each count of this complaint:

8. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act prohibits the discharge of pollutants into navigable waters of the United States, unless it is in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).

9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA or State, to permit discharges into navigable waters, subject to specific terms and conditions. 33 U.S.C. § 1342.

10. The Act requires that a discharge of storm water associated with an industrial activity to navigable waters must comply with the requirements of an NPDES permit. 33 U.S.C. § 1342(p).

1 11. The Act authorized, and EPA issued, regulations that further define requirements for
2 NPDES permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are
3 found at 40 C.F.R. part 122.
4

5 12. EPA regulations define discharges associated with industrial activity to include
6 construction activity. 40 C.F.R. § 122.26(b)(14)(x)
7

8 13. EPA regulations require each person who discharges storm water associated with
9 industrial activity to either apply for an individual permit or seek coverage under an existing and
10 lawful general permit. 40 C.F.R. § 122.26(c).
11

12 14. The State of Colorado has lawfully issued a general permit, under the authority of
13 State law and the Act, which authorizes the discharge of storm water associated with
14 construction activities, if done in compliance with the conditions of the permit. The State of
15 Colorado issued permit no. COR- 033976 to Adolfson and Peterson Construction on October 4,
16 2001, which provided coverage under COR-030000. Colorado permit no. COR-030000;
17 attached as exhibit A (“permit”).
18

19 15. The permit requires, among other things, that a person discharging pollutants develop
20 and implement an adequate storm water management plan (SWMP), conduct regular specified
21 storm water inspections, and implement best management practices (“BMPs”), etc. BMPs
22 include structural controls (such as sediment ponds and silt fences) and management practices
23 (such as a dedicated concrete washout area and street sweeping).
24

25 16. Respondent (Miller Weingarten Realty, LLC) is a corporation, incorporated in the
26 State of Colorado, and doing business in the State of Colorado.
27

28 17. Respondent (Adolfson & Peterson, Inc.) is a corporation, incorporated in the State of
29 Minnesota , and doing business in the State of Colorado.
30

31 18. Respondents are “persons” within the meaning of section 502(5) of the Act, and
32 therefore subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).
33

34 19. Respondents own or were engaged in construction activities at a facility located at the
35 Aurora Town Center, at Alameda Ave. and Sable Boulevard, Aurora, CO (“facility”).
36

37 20. Respondents engaged in construction activities at the facility at all times relevant to
38 this action.
39

40 21. Respondents therefore engaged in an “industrial activity” as defined by EPA
41 regulations. 40 C.F.R. § 122.26(b)(14).
42
43

1 22. Storm water, snow melt, surface drainage and run off water leaves Respondents'
2 facility and goes into the Aurora municipal separate storm sewer system (MS4).
3

4 23. The run off and drainage from Respondents' facility is "storm water" as defined by
5 EPA regulations. 40 C.F.R. § 122.26(b)(13).
6

7 24. Storm water contains "pollutants" as defined by the Act. 33 U.S.C. § 1362(6).
8

9 25. The Aurora MS4 drains to West Tollgate Creek which is a "navigable water" and
10 "waters of the United States," as defined by the Act and EPA regulations, respectively.
11 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.
12

13 26. Respondents' storm water runoff is the "discharge of a pollutant" as defined by EPA
14 regulations. 40 C.F.R. § 122.(b)(14)(x).
15

16 27. An authorized EPA employee entered the facility with the consent of Respondents
17 on October 4, 2002, to inspect it for compliance with the statute, permit and regulations. The
18 counts below outline violations confirmed by the inspector.
19

20 28. Construction activities disturbing over five acres commenced at the facility in
21 October 2001.
22

23 29. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require
24 that a stormwater permit be obtained for construction activity including clearing, grading and
25 excavation disturbing at least five acres. Respondent is covered under the permit and subject to
26 its terms and conditions.
27

28 **COUNT 1**

29

30 30. Respondents failed to conduct inspections as required by the permit.
31

32 31. Respondents' failure to conduct inspections as required by the permit constitutes
33 violations of the Act. 33 U.S.C. § 1319, § 1342(p).
34

35 **COUNT 2**

36

37 32. At the time of that inspection, Respondents' SWMP did not contain the following
38 required components: site description, other controls necessary to address specific limitations
39 (concrete wash, chemical storage, etc.), signatory requirement, and procedures for SWMP review
40 and changes.
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42 33. Respondents' failure to develop a complete SWMP as required by the permit
43 constitutes violations of the Act. 33 U.S.C. § 1319, § 1342.

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COUNT 3

34. The permit requires Respondents to implement best management practices (BMPs) in order to minimize the impact of Respondents construction activities on waters of the U.S. At the time of that inspection, the following BMPs were not in place or were not being implemented: storm drain inlet protection, vehicle track out pad, and BMPs for erosion and/or sediment controls from slopes or other construction activity areas. The inspection also found inadequate storm drain inlet protection on Sable Boulevard where sediments were being discharged into the Aurora MS4.

35. Respondents' failure to implement BMPs as required by the permit constitutes violations of the Act. 33 U.S.C. § 1319, § 1342(p).

PROPOSED CIVIL PENALTY

36. The Act authorizes the assessment of a civil penalty of up to \$27,500 per day, for each violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the violation; Respondents' prior compliance history of such violations; Respondents' culpability for the violation; any economic benefit or savings gained from the violation; and other factors that justice may require.

37. In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty of \$137,500 be assessed against Respondents for the violations alleged above, as explained below:

Nature, Circumstances, Extent, and Gravity of Violations

Respondents had control of storm water management at the facility beginning in October 2001. The October 4, 2002 inspection by EPA found that the SWMP did not adequately describe the BMPS that would be implemented at the site. The SWMP did not contain all the required information as outlined in the permit including site description, signatory requirements, and other controls (such as location and operation of concrete wash areas, chemical storage, etc.), and procedures for SWMP review and changes. The EPA inspection revealed the following BMPs were not in place or were not being implemented: inlet storm drain protection, vehicle track out pads, and BMPs for erosion and/or sediment control from slopes and other construction activity areas. The lack of BMPs resulted in sediment loading into the detention ponds that were connected and discharging into the Aurora MS4. The BMP (inlet storm drain protection) on Sable Boulevard was also inadequate where sediments were being discharged into the Aurora MS4. The EPA inspection also found that storm water inspections have not been conducted by the facility as required by the permit.

1 Prior Compliance History

2
3 This Order is the first enforcement actions EPA Region 8 has issued to Respondents
4 requiring compliance with the applicable storm water regulations.
5

6 Degree of Culpability

7
8 Respondents have a copy of the storm water permit, and should have been aware of all
9 the requirements therein.
10

11 Economic Benefit

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13 An economic benefit was experienced by Respondents for failure to comply with the
14 storm water permit. Specifically, Respondent benefitted by not spending the required
15 funds to install the necessary BMPs (storm drain inlet protection, sediment and erosion
16 control, vehicle track out pad) by October 2001, to conduct the required inspections, to
17 develop a complete SWMP by October 2001, and to maintain the storm drain inlet
18 protection along Sable Boulevard. Additional information may be collected in regard to
19 this factor supporting a greater penalty adjustment.
20

21 Ability to Pay

22
23 **EPA did not reduce the proposed penalty due to this factor, but will consider any**
24 **new information Respondent may present regarding Respondent's ability to pay the**
25 **penalty proposed in this Complaint.**
26

27 Other Matters that Justice may Require

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29 No adjustments made regarding these factors at this time.
30

31 38. As required by the Act, prior to the assessment of a civil penalty, EPA will provide
32 public notice of the proposed penalty, and reasonable opportunity for the public to comment on
33 the matter, and present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).
34

35 39. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and
36 may assess a penalty above the proposed amount, up to the \$27,500 per day per violation
37 authorized in the statute.
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1 To discuss settlement or ask any questions you may have about this case or process,
2 please contact David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the
3 address below.

4
5 United States Environmental Protection Agency
6 Region 8, Office of Enforcement, Compliance and
7 Environmental Justice, Complainant
8 999 18th Street, Suite 300 (ENF-L)
9 Denver, CO 80202

10
11
12
13 Date: 7/9/03

14 By: SIGNED
15 Carol Rushin
16 Assistant Regional Administrator
17
18
19

20 SIGNED
21 David J. Janik, Supervisory Enforcement Attorney
22 Legal Enforcement Program
23

24 **IF YOU WOULD LIKE COPIES OF THE COVER LETTER OR THE ATTACHMENTS,**
25 **PLEASE CONTACT THE REGIONAL HEARING CLERK.**

26
27 **THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.**